KEPONG PROSPECTING LTD. & ORS. v. SCHMIDT

[P.C. (Lord Guest, Lord Wilberforce, Lord Pearson, Sir Douglas Menzies & Sir Alfred North) October 3, 1967]

[Privy Council Appeal No. 6 of 1965]

Contract — Jus quaesitum tertio — Stranger has no right to enforce contract — Consideration.

Contract — Consideration — Payment for services — Claim for services to company "prior to formation" — Whether company bound to pay — Whether inclusion of ineffective element prevents operation of other valid consideration — Services rendered after incorporation — Contracts (Malay States) Ordinance, 1950, s. 2(d).

Federal Court — Jurisdiction — Evidence — Finding of fact — Evidence supporting different finding — Whether Federal Court bound to reach conclusion different from that of trial court.

Contract — Formation — Evidence — Date on face of document — Person seeking to establish execution on different date — Onus probandi.

These were two appeals from the judgment of the Federal Court of Malaysia ([1964] M.L.J. 416) which allowed the appeal of one Schmidt from a judgment of Hashim J.

The matters arose out of prospecting permits over certain State land in Johore. In 1953 one Tan applied to the Government of the State of Johore for a prospecting permit for iron ore. He was assisted in the negotiations by Schmidt, a consulting engineer. A prospecting permit No. 10/53 was granted to Tan in November 1953 and in December 1953 Tan wrote to Schmidt stating that Schmidt was to be paid 1% of the selling price of all ore that might be sold from any portion of the said land and this was in payment for the work Schmidt had done in assisting to obtain the prospecting permit and for any work that Schmidt might do in assisting to have mining operations started up. Tan then executed a power of attorney in favour of Schmidt which conferred upon Schmidt widely expressed powers to contract for the disposal of any of Tan's mining properties on such consideration and subject to such conditions as Schmidt thought proper.

The appellant company was incorporated on July 27, 1954 with a view to taking over the benefit of Tan's prospecting permit — Schmidt and Tan being the first directors of the company. On July 31, 1954 an agreement was entered into between Tan and the company (hereinafter called the "1954 agreement") and it was executed on behalf of Tan by his attorney Schmidt acting under the aforesaid power of attorney. The 1954 agreement provided that the company should prospect and work the land included in the prospecting permit No. 10/53 and it was also provided that the company should take over Tan's obligation to pay Schmidt 1% of the selling price of all ore that might be sold from such land. The 1954 agreement was adopted on behalf of the company at a meeting of its directors on July 31, 1954.

Sometime in September, 1955, a further agreement (hereinafter called the 1955 agreement) was made between the company and Schmidt. Under clause 1 of the agreement the company *inter alia* agreed to pay Schmidt 1% of all ore that might be won from any land comprised in the 1954 agreement in "consideration of the services by the consulting engineer for and on behalf of the company prior to its formation, after incorporation and for future services". The 1955 agreement was signed by Schmidt and the seal of the company was affixed to it in the presence of Tan and one Ironside who signed as a proxy for one Marjoribanks who was a director of the company.

In December 1955 an additional prospecting permit No. 3/55 was granted to Tan from July 27, 1954 to March 1956. Prospecting was carried on on the lands under prospecting permits 10/53 and 3/55. Workable deposits of iron ore were discovered but it became apparent that additional capital was required. Therefore on the August 4, 1953 a meeting of the directors of the company was held which was attended by the third party appellant Jagatheesan (hereinafter called the said Jagatheesan) and it was resolved that 315,000 shares of $1 each in the company should be allotted to the said Jagathesan and his associates and the allottment was carried out. Disputes soon arose between those originally interested in the company and the third parties appellants as a result of which an originating motion was filed by one Lim a shareholder in the company with the third parties appellant, the company and one Smith as the respondents to the motion. The relief sought was that the register of the company be rectified by removing the names of the third parties appellants and the said Smith as shareholders. The motion came before Sutherland J. in March 1957 and after the hearing had commenced a compromise was arrived at by the parties. This compromise was embodied in a consent order on March 27, 1957 which *inter alia* provided that (a) the register of the company be rectified by deleting the names of the third parties appellants and the said Smith as shareholders (b) the company was ordered to grant to the third parties appellants a sub-lease of the land included in the prospecting permits. The consent order also provided in clause 10 that the 1954 agreement shall be taken over by the third parties appellants and their nominees who shall indemnify the company against all claims which may be made against the company thereunder. A draft of this consent order was approved by the directors of the company (at which date Schmidt was still a director) in May 1957. Schmidt was dismissed from office as managing director and subsequently ceased to be a director in August 1959. He commenced the present proceedings in July 1959 claiming an account of all moneys payable to him under the 1954 agreement, the 1955 agreement or one or other of them. The company counterclaimed alleging breach of his duty as managing director in failing to bring the existence of the 1955 agreement to the notice of the company's legal adviser and claiming damages to the extent of any sums payable to Schmidt under the 1955 agreement. The company also issued a third party notice against the third parties appellants claiming under the terms of the consent order to be indemnified by the third parties against all liability to Schmidt under the 1954 agreement or the 1955 agreement.

Hashim J. dismissed the action and held that the evidence did not establish that the seal of the company had been affixed to the 1955 agreement on or after October 1, 1955 so that it was not validly executed in accordance with the articles of association of the company. The Federal Court reversed the decision of the trial judge and ordered the company to pay Schmidt $251,529.50 and that the company should be indemnified by the third parties appellants. On appeal:—

Held: (1) the date appearing on the face of the 1955 agreement was *prima facie* evidence that it was executed on that date. The onus of proof lay on those who sought to establish that it was in fact executed on a different date so to do and since there was ample evidence to show that the seal could have been fixed only after October 1, the Federal Court was bound to reach a conclusion different from that of the trial judge;

(2) clause 1 of the 1955 agreement established a legally sufficient consideration moving from Schmidt. Services prior to the company's formation could not amount to consideration as they could not be rendered to a non-existent company, nor could the company bind itself to pay for services claimed to have been rendered before its incorporation. But the inclusion of that ineffective element did not prevent the other two elements

or one of them, from constituting valid consideration. Services rendered after incorporation but before the date of the agreement validly amounted to consideration for an agreement to pay under section 2(d) of the Contract (Malay States) Ordinance, 1950. There was no doubt that such services were rendered;

(3) the 1955 agreement was not void for uncertainty because it stated that the tribute of 1% should be calculated "on the selling price of the ore as shown in the company's records" because this was clearly a case where an expression on the face of it possibly lacking in definition can be attributed a certain meaning by evidence as there was no difficulty in showing what price was referred to in the clause;

(4) the 1955 agreement was not discharged by novation because Schmidt was not a party to the consent order;

(5) the power of attorney from Tan to Schmidt was wide enough in its terms to permit Schmidt to enter into the 1954 agreement on behalf of Tan. However the 1954 agreement was not enforceable by Schmidt against the company, as he was not a party to it in his personal capacity;

(6) clause 10 of the consent order contemplated the existence of an obligation from the company to Schmidt, and as a whole must be read as referring to the 1954 agreement as supplemented or superseded by the 1955 agreement, so as to produce a direct obligation by the company to pay Schmidt the 1%. Therefore the third parties were obliged to idemnify the company against Schmidt's claim.

Cases referred to:—

(1) *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847 at p. 853.

(2) *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446 at p. 468.

(3) *Subbu Chetti* v. *Arunachazam Chettiar* (1930), I.L.R. 53 Madras 270.

(4) *Khirod Behari Dutt* v. *Man Gobinda* A.I.R. 1934 Cal. 682.

(5) *Protapmull Rameswar* v. *State of West Bengal* (1957), 61 C.W.N. 78.

(6) *Babu Ram* v. *Dhan Singh* A.I.R. 1957 Punjab 169.

(7) *National Petroleum Co. Ltd.* v. *Popatlal* A.I.R. 1936 Bom. 344.

The following cases were also cited in argument:—

Seton, Laing & Co. v. *Lafone* (1887), 19 Q.B.D. 68, 70; 3 T.L.R. 624, C.A.; *In re Casey's Patents, Stewart* v. *Casey* [1892] 1 Ch. 104, 115, 116, C.A.; *Ainsworth* v. *Wilding* [1896] 1 Ch. 673, 674-679. *British Homes Assurance Corporation Ltd.* v. *Paterson* [1902] 2 Ch. 404, 408; 18 T.L.R. 676; *In re English & Colonial Produce Co. Ltd.* [1906] 2 Ch. 435, 441, 422; 22 T.L.R. 669, C.A.; *Pieie* v. *Richardson* [1927] 1 K.B. 448, C.A.; *Kinch* v. *Walcott* [1929] A.C. 482, 493, 494, P.C.; *In re Schebsman* [1914] Ch. 83, 89; 60 T.L.R.; *McDonald* v. *John Twiname Ltd.* [1953] 2 Q.B. 304; [1953] 3 W.L.R. 347; [1953] 2 All E.R. 589, C.A.; *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87; *Lam Soon Oil & Soap Manufacturing Ltd.* v. *Impex Syndicate Ltd.* [1964] M.L.J. 176.

PRIVY COUNCIL APPEAL.

P. Oliver Q.C. and *Peter Mooney* for the appellant.

H. A. P. Fisher Q.C., *M. Anwyl-Davies* Q.C. and *P. de la Piquerie* for the 3rd parties appellants.

Mervyn Heald and *A. L. Hills* for the respondent.

Lord Wilberforce (delivering the judgment of the Board): These are two appeals from the judgment of the Federal Court of Malaysia (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) which allowed the appeal of A. E. Schmidt from a judgment of the High Court at Kuala Lumpur (Hashim J.). The Federal Court ordered that judgment should be entered in favour of A. E. Schmidt against the appellant company for a sum equal to one per cent of the selling price of all iron ore sold from certain mines in Johore which sum has been certified to amount to $251,529.50. It was further ordered that the appellant company should be indemnified by the third parties appellants against their liability to A. E. Schmidt. Since the hearing in the Federal Court, A. E. Schmidt has died and his widow Marjorie Schmidt has been substituted as respondent. References in this judgment to Schmidt are to A. E. Schmidt.

The matters arise out of prospecting permits over certain State land in Johore. The first step in relation to this land was taken in 1953 when Tan Chew Seah (hereinafter called "Tan") applied to the Government of the State of Johore for a prospecting permit for iron ore. He was assisted in the negotiations by Schmidt who was a consulting engineer. A prospecting permit (numbered 10/53) over 1,000 acres of State land at Bukit Kepong was granted to Tan on 25th November 1953. On 2nd December 1953 Tan wrote a letter to Schmidt which contained the following agreement:

> "I hereby agree to ensure that you are paid one per cent of the selling price of all ore that may be sold from any portion of the said land. This is in payment for the work you have done in assisting to obtain the prospecting permit and any work you may do in assisting to have mining operations started up."

On 11th July 1954 Tan executed a power of attorney in favour of Schmidt which conferred upon him widely expressed powers to contract for the disposal of any of Tan's mining properties for such consideration and subject to such conditions as Schmidt should think proper.

The appellant company, Kepong Prospecting Ltd., was incorporated on 27th July 1954 with a view to taking over the benefit of Tan's prospecting permit. Schmidt and Tan were among the first directors of the company. On 31st July 1954 an agreement (hereinafter referred to as "the 1954 agreement") was made between Tan and the appellant company. This agreement was executed on behalf of Tan by Schmidt acting under the power of attorney. Their Lordships will refer in greater detail to this agreement later. Briefly it provided that the company should prospect and work the land included in the prospecting permit as well as any additional land comprising the same mining

project and it was agreed that the appellant company should take over the obligation of Tan to pay Schmidt one per cent of the selling price of all ore that might be sold from such land. On 31st July 1954, the 1954 agreement was adopted on behalf of the appellant company at a meeting of its directors.

On or about 26th September 1955 a further agreement (hereinafter referred to as "the 1955 agreement") was made between the appellant company of the one part and Schmidt of the other part. This agreement, to which their Lordships will refer more fully hereafter, contained a clause by which the appellant company agreed to pay to Schmidt 1 per cent of all ore that might be won from any land comprised in the 1954 agreement. The 1955 agreement was signed by Schmidt and the seal of the appellant company was affixed to it in the presence of Tan and of one D. G. Ironside. The said Ironside signed the agreement as proxy for N. A. Marjoribanks (a director of the appellant company) under an appointment as such proxy approved by the directors of the appellant company on 26th September 1955. This appointment was expressed to operate from 1st October 1955 to 31st December 1955.

In December 1955 an additional prospecting permit numbered 3/55 was granted to Tan in respect of 1,200 acres at Bukit Pasol. From the date of incorporation of the company until March 1956 prospecting was carried out on the land included in the prospecting permits 10/53 and 3/55. Workable deposits of iron ore were discovered but it became apparent that the appellant company required additional capital in order to enable it to start mining operations. It was in this connection that the third parties appellants became interested in the project. On 4th August 1956 a meeting of the directors of the appellant company was held which was attended by the third party S. K. Jagatheesan and it was resolved that 315,000 shares of $1 each in the appellant company should be allotted to the said Jagatheesan and his associates. This allotment was carried out. Disputes, however, arose between those originally interested in the appellant company and the third parties appellants as a result of which an originating motion was filed in the High Court at Kuala Lumpur on 25th September 1956 by Lim Ngian Cher a shareholder in the appellant company. The third parties appellants, the appellant company, and L. A. J. Smith were respondents to the motion. The relief sought was that the register of the appellant company be rectified by deleting the names of the third parties appellants and the said Smith as holders of shares. The motion came before Sutherland J. in March 1957 and, after the hearing had commenced, a compromise was agreed. This compromise was embodied in a consent order made by Sutherland J. on 27th March 1957. By this order it was ordered that the register of the appellant company be rectified by deleting the names of the third parties appellants and the said L. A. J. Smith as holders of shares registered in their names and that the issue of shares to them be cancelled. The appellant company was ordered to grant to the third parties appellants a sub-lease of the land included in the prospecting permits which had by then been comprised in a mining certificate. The consent order contained also as clause 10 a provision in the following terms:

> "'The agreement between Kepong Prospecting Limited and Tan Chew Seah dated the 31st day of July 1954 whereby 1 per cent of the value of all ore sold from the mining land is to be paid by the company to Mr. A. E. Schmidt shall be taken over by the respondents numbered 1 to 7 and 9 but not 8' (namely the third party appellants) 'or their nominees and the respondents numbered 1 to 7 and 9 but not 8 shall indemnify Kepong Prospecting Limited against all claims which may be made against Kepong Prospecting Limited thereunder.'"

A draft of this consent order was approved by the directors of the appellant company on 27th May 1957 on which date Schmidt was still a director of the appellant company. He concurred in the approval of the said draft. Schmidt was dismissed from his office as managing director of the appellant company on 19th May 1957 and ceased to be a director on 2nd August 1959. He commenced the present proceedings on 24th July 1959 claiming an account of all the moneys payable to him under the 1954 agreement, the 1955 agreement or one or other of them. The appellant company, as well as defending this action, counterclaimed against Schmidt alleging breach of his duty as managing director in failing to bring the existence of the 1955 agreement to the notice of the appellant company's legal adviser and claiming damages to the extent of any sums payable to Schmidt under the 1955 agreement. The appellant company also issued a third party notice against the third parties appellants claiming, under the term in the consent order already referred to, to be indemnified by the third parties against all liability to Schmidt under the 1954 agreement or the 1955 agreement.

Their Lordships consider first the claim by Schmidt against the appellant company under the 1955 agreement. The first point taken for the appellant company was that the 1955 agreement was not validly executed on its behalf. Under article 101 of the appellant company's articles of association it is required that the seal of the company should be affixed to any instrument in the presence of at least one director and of the managing director or a permanent director. Tan, who was one of the persons in whose presence the seal was stated to have been affixed, was a permanent director and the critical question was whether D. G. Ironside, who was the other person in whose presence the seal was

stated to have been affixed, was a qualified person to act for this purpose. The trial judge, Hashim J., came to the conclusion that the 1955 agreement was not executed in accordance with article 101. He relied on the fact that the agreement bore the date 26th September 1955 whereas the appointment of Ironside as proxy for N. A. Marjoribanks (a director) did not operate until 1st October 1955. He held that the evidence of Ironside that he must have affixed his signature on or after 1st October was "rather unsatisfactory" and that it had not been made out that the seal of the company had been affixed on or after that date. In the Federal Court a different conclusion was reached and it was held that on the evidence as a whole it was established that the seal was affixed on or after 1st October when Ironside was a qualified person. Before their Lordships it was argued that the Federal Court should not have interfered with the decision of the trial judge on what was essentially an issue of fact and that the latter's finding should be restored. Their Lordships have no hesitation in holding that the Federal Court was entitled and indeed bound to reach a different conclusion from that of Hashim J. Their Lordships accept, as did the Federal Court, that since the date 26th September 1955 appears on the face of the document, that is *prima facie* evidence that the document was executed on that date. They accept also that the onus lies on those who seek to establish that the document was in fact executed on a different date. They consider, however, that the evidence which was available at the trial is such as to establish beyond any doubt that the appellant company's seal could not have been affixed on 26th September and must have been affixed later than 1st October. In the first place evidence was given by Schmidt, on which he was not cross-examined, that he signed the document on 26th September but that it could not be sealed on that date because Tan, whose signature was necessary as that of a permanent director, was absent from Kuala Lumpur. He said that he himself left Kuala Lumpur for a few days and did not return until 2nd October and that it was on the next day, namely 3rd October, that Tan came to him at his office upon which he (Schmidt) telephoned to Ironside and the three of them (Schmidt, Tan, Ironside) went to the office of the company's secretary where the document was sealed. The secretary of the appellant company, one Leong, gave evidence substantially confirming the evidence of Schmidt. He was sure that the document was sealed not on 26th September but during the first week in October. N. A. Marjoribanks also gave evidence that Tan was not present at the meeting on 26th September. Quite apart therefore from the evidence of Ironside (which was in fact consistent with that of the other witnesses) there was ample material to show that the seal could only have been affixed after 1st October 1955, at a date when Ironside was qualified to sign as a proxy director.

Apart from the question as to the validity of the execution of the 1955 agreement, the appellant company submitted that Schmidt was not entitled to sue upon it for a variety of reasons. In the first place it was said that there was no consideration given by Schmidt for the obligation undertaken by the appellant company. The consideration expressed in the 1955 agreement was (by clause 1) as follows:

> "The company shall in consideration of the services rendered by the consulting engineer for and on behalf of the company prior to its formation after incorporation and for future services pay to the consulting engineer one per cent. . . . "

Their Lordships agree with the Federal Court in holding that this establishes a legally sufficient consideration moving from Schmidt. They accept that the services "prior to its formation" cannot amount to consideration. No services can be rendered to a non-existent company, nor can a company bind itself to pay for services claimed to have been rendered before its incorporation. The inclusion of this ineffective element, however, does not prevent the other two elements, or one of them, from constituting valid consideration, and both of them, in their Lordships' opinion do so. Services rendered after incorporation but before the date of the agreement, can under the law of Malaysia, validly amount to consideration for an agreement to pay, since section 2(d) of the Contracts (Malay States) Ordinance (No. 14 of 1950) expressly provides for this; in point of fact there is no doubt that such services were rendered. As regards future services their Lordships would hold if necessary that the clause should be understood as meaning that Schmidt as consulting engineer agreed to make his services available in the future if required by the company. Sufficient consideration is therefore established.

Secondly, it was said that the agreement was void for uncertainty because it was stated that the tribute of one per cent should be calculated "on the selling price of the ore as shown in the company's records". Their Lordships do not agree with this contention. This is clearly a case where an expression on the face of it possibly lacking in definition can be attributed a certain meaning by evidence, and in fact and in result there was no difficulty in showing what price was referred to in the clause.

Thirdly, it was contended by the appellant company that Schmidt was not entitled to recover the full amount stipulated in the 1955 agreement because of a statement made by him at a meeting of directors on 1st March 1956. At this meeting, as recorded in the minutes, Schmidt informed the directors that he would accept one per cent tribute on the f.o.b. price of the ore, less export duty and the barge contract rate, in

settlement of the company's obligation under the agreement between him and the company dated 26th December [*sic*] 1955. There was some conflict of evidence as to the circumstances in which this statement was made but in any event their Lordships consider that it amounted to no more than a voluntary offer by Schmidt which was never accepted by the appellant company and which never assumed contractual force.

Fourthly, it was submitted on behalf of the appellant company that the 1955 agreement was discharged by novation by the consent order of 27th March 1957. Their Lordships need say no more with regard to this submission than that Schmidt was not a party to the consent order and that they are fully satisfied, after consideration of the evidence regarding Schmidt's knowledge of the making of the order, that there is no basis for this contention. They are of the same opinion with regard to an alternative submission that Schmidt by his conduct in acquiescing to or approving (on behalf of the appellant company) the consent order, had estopped himself from relying upon the 1955 agreement.

Their Lordships reach the conclusion, in agreement with the Federal Court, that the appeal of the appellant company against the respondent Marjorie Schmidt must fail for the reason that Schmidt was entitled to the account claimed by him under the 1955 agreement and to payment of the money found due on that account.

There remains the claim of the appellant company for indemnity against the third parties appellants. This indemnity is claimed by virtue of clause 10 of the consent order which has been set out above. This clause in terms refers to the 1954 agreement and the first submission on behalf of the appellant company was that if it was liable at all to Schmidt it was so liable under the 1954 agreement which in terms is covered by the indemnity clause. It becomes therefore necessary to consider whether this is correct. The 1954 agreement was, as has been stated, made between Tan (acting by Schmidt as his attorney) of the one part and the appellant company of the other part. It was argued that Schmidt had no power under the power of attorney to enter into the agreement on behalf of Tan, but their Lordships find no difficulty in holding that the power of attorney was amply wide enough in its terms to permit this. The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it. In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English Law, Schmidt would be unable to enforce it. Their Lordships need, on this point, do no more than state their agreement with the judgment of the Federal Court which correctly stated the law from well-known passages in the opinions of the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[1] and *Scruttons Ltd.* v. *Midland Silicones Ltd.*[2] But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of *jus quaesitum tertio*. Their Lordships are of opinion that the appellant company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law. It is true that section 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of "consideration" than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue. Reference was made to certain Indian decisions on the Indian Contract Act on which the Contracts (Malay States) Ordinance is based. These were *Subbu Chetti* v. *Arunachazam Chettiar*[3] (where however it was said that the balance of authority is in favour of the view that a stranger to the contract cannot without more sue to enforce it) and *Khirod Behari Dutt* v. *Man Gobinda.*[4] But other decisions in a contrary sense were cited which appeared to their Lordships to be more authoritative: their Lordships refer to decisions cited in *Subbu Chetti* v. *Arunachazam Chettiar* and in *Pollock and Mulla* on the Indian Contract Act, 6th Edition, pp. 21 ff. and to two decisions so recent as 1957 (*Protapmull Rameswar* v. *State of West Bengal.*[5] and *Babu Ram* v. *Dhan Singh.*[6] These, in their Lordships' view, confirm that the law was correctly stated by Sir John Beaumont C.J. in the Bombay case of *National Petroleum Co. Ltd.* v. *Popatlal.*[7] In a passage, which though strictly *obiter*, was based on a full argument and consideration of the cases, the learned Chief Justice expressed the view that *Khirod Behari Dutt* v. *Man Gobinda* was opposed to established principle and authority. An argument on this legal issue was, so their Lordships were informed, submitted to the Federal Court: no reference to it appears in their judgment and their Lordships must assume that they did not accept it. The appellants failed to persuade their Lordships that they were wrong.

The 1954 agreement was therefore, in their Lordships' opinion, not enforceable by Schmidt against the appellant company, and it is in the light of this that consideration must be given to clause 10 of the consent order.

Before approaching its construction, it is necessary to restate the circumstances in which this agreement was made. By his letter of 2nd December 1953, Tan had agreed with Schmidt "to ensure that you are paid one per cent of the selling price of all ore. . . ." By this letter, Tan undertook no obligation himself to make any payment, but he was to ensure payment by another viz. the persons or company eventually extracting the ore. The 1954 agreement between Tan and the appellant company contained a recital of this obligation; and the operative clause (clause 4) was evidently drafted in compliance with it. It read: "the company shall take over the obligation of the Permit Holder [Tan] to pay A. E. Schmidt one per cent of the selling price of all ore" — and extended the area to which the obligation should relate. This agreement was tabled at the first meeting of the directors of the appellant company held on 31st July 1954: the relevant minute reads:

> "The copy of agreement dated 31st July 1954 *between Mr. Tan Chew Seah and Mr. A.E. Schmidt and the company* was tabled. It was resolved that the same be adopted. Notice of the agreement has been given to Mr. A. E. Schmidt and he accepts it in so far as it relates to his dealings with Mr. Tan Chew Seah."

This suggests that the 1954 agreement was at the time regarded as enforceable by Schmidt. Later, in 1955, it appears that Mr. Marjoribanks, the company's legal adviser, thought that as a tidying up operation the 1955 agreement should be executed, and it is minuted, on 26th September, as a supplementary agreement. That agreement recited clause 4 of the 1954 agreement and recited further that "it is deemed advisable that the company should enter into this supplementary agreement with the consulting engineer". The operative clause 1 contained a direct obligation on the part of the company to Schmidt to pay him the one per cent. The relation between clause 4 of the 1954 agreement and the 1955 agreement may be variously described. The Federal Court considered that the 1954 agreement established an obligation to pay one per cent to Schmidt which was lacking the element of enforceability by Schmidt: the 1955 agreement merely added this element. It was in this sense supplementary to it. It may, alternatively, be considered as superseding the earlier obligation: in support of the latter alternative it may be asked what force could be left to clause 4 after the conclusion of the 1955 agreement: the company had discharged its obligation to Tan to take over the latter's obligation by the agreement it made with Schmidt.

With this in mind, clause 10 of the consent order must be construed. The clause commences by a reference to the 1954 agreement, mentioning it specifically and accurately by date and parties. This enabled counsel for the third parties to argue, as he forcefully did, that it was not necessary or proper to look beyond the 1954 agreement: the clause was unambiguous and the only obligation assumed by the third parties related to the 1954 agreement: consequently, since Schmidt had (as has been shown) no rights under that agreement, the indemnity did not arise. The duty to indemnify only related, it was said (and this must follow if the argument is correct) to any claim which Tan might make against the appellant company.

This argument appears at first sight plausible enough but, in their Lordships' view, it does not survive a more careful scrutiny of the clause. After the reference to the 1954 agreement, the clause continues "whereby one per cent of the value of all ore sold from the mining land is to be paid by the company to Mr. A. E. Schmidt".

These words have no intelligible meaning if the scope of the clause is confined to the 1954 agreement: under the agreement the company assumed an obligation to Tan; the words quoted on the other hand contemplate the existence of an obligation from the company to Schmidt. These words make it impossible to read the clause as referring to the 1954 agreement literally and alone: indeed it would be unreal to do so since, as has been stated, the 1954 agreement had been supplemented (on one view) or superseded (on another view) by the 1955 agreement so as to produce a direct obligation by the company to pay Schmidt the one per cent. On the other hand to read the clause as a whole as referring to the 1954 agreement as so supplemented or superseded makes it consistent and intelligible. Their Lordships therefore are of opinion that the third parties are obliged to indemnify the appellant company against Schmidt's claim.

Since the appellant company is entitled to this indemnity, the counterclaim against Schmidt in respect of his alleged negligence in not bringing the 1955 agreement to the company's notice does not arise, but in any event there is no substance in this claim.

The result is that the appeal of Kepong Prospecting Co. Ltd. should be dismissed and the appellant company should pay the respondent's costs of the appeal. The sum of money which their Lordships understand has been lodged in court should be applied towards payment of the amount due to the respondent under this judgment and the case remitted to the High Court at Kuala Lumpur for any necessary direction. The appeal of the third parties appellants should be dismissed: they should indemnify the appellant company against any costs payable to the respondent on this appeal and against the appellant company's costs of their appeal against the respondent the latter to be taxed as between solicitor and client. They should pay the appellant company's costs (to be taxed as between party and party) incurred in relation to the appeal by the third parties appellants.

Their Lordships will report their opinion to the Head of Malaysia accordingly.

Appeals dismissed.

Solicitors: *Stephenson, Harwood & Tatham; Speechley, Mumford & Soames; Parker, Garrett & Co.*

TAY CHWEE CHENG v. SINGAPORE SING HUA POEY CHIN ASSOCIATION

[O.C.J. (Ambrose J.) January 12, 1968]
[Singapore — Suit No. 1228 of 1966]

Landlord and Tenant — Premises subject to Control of Rent Ordinance — Possession claimed under s. 15(1)(d) of the Control of Rent Ordinance (Cap. 242).

Possession was claimed under section 15(1)(d) of the Control of Rent Ordinance on the ground that the defendant had been guilty of using or permitting the use of the premises as a common gaming house in contravention of section 4(1)(b) of the Common Gaming Houses Ordinance, 1961.

Held: there was no evidence to show that the defendants had been guilty of using or permitting the use of the premises as a common gaming house in contravention of section 4(1)(a) or (b) of the Common Gaming Houses Ordinance, 1961.

[Editorial Note: On appeal, the Federal Court dismissed it on the ground that the action was misconceived, defendants being an unincorporated association and could not be tenants at law: *Indo Australian Trading Co.* v. *Hin Ann Huay Kuan* [1956] M.L.J. 193 and *Malay Women's Welfare Association* v. *Tan Ek Joo Realty Co.* (1957), 3 M.C. 101.]

CIVIL SUIT.

James Loh for the plaintiff.

T. C. Cheng for the defendant.

Ambrose J.: This action was brought by the plaintiff to recover possession of the premises known as No. 228 Orchard Road, Singapore.

The premises, which were let by the plaintiff to the defendant, were at all material times subject to the Control of Rent Ordinance (Cap. 242). The defendant's tenancy was duly determined on the 30th April, 1966, by a notice to quit in writing dated the 29th March, 1966, and served on the defendant on the 31st March, 1966.

Possession was claimed under section 15(1)(d) of the Control of Rent Ordinance on the ground that the defendant had been guilty of using or permitting the use of the premises as a common gaming house in contravention of section 4(1)(b) of the Common Gaming Houses Ordinance, 1961. The said section 4(1)(b) reads:—

"Any person who permits a place of which he is owner or occupier or of which he has the use temporarily or otherwise to be kept or used by another person as a common gaming house shall be guilty of an offence and shall be liable on conviction to a fine not exceeding six thousand dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."

Ang Kim Whatt, an Acting Assistant Superintendent of Police, gave the following evidence for the plaintiff. On the 15th July, 1965, a police party led by him raided the premises in question at about 2.20 a.m. and arrested 28 persons for gambling. They were all charged with gaming in a common gaming house in contravention of section 6(1) of the Common Gaming Houses Ordinance. All of them pleaded guilty, were convicted and fined. Two of them were living at the premises. More than half of them were members of the defendant association. No action was taken against the defendant.

Fong Ying Loong, an Assistant Superintendent of Police, testified that no further action was taken against the defendant on the instructions of the Deputy Public Prosecutor.

Lim Eng Peng, who was called by the defendant, gave the following evidence. He was president of the defendant association for the last 18 years. Rule 32 of the rules of the association forbids gambling of any kind on the association's premises. Notices were posted on the premises forbidding gambling. Since he became a member of the association in 1949 he had not seen any form of gambling at the premises. The association had never been charged with any offence. The premises were closed after 12 midnight. He came to know about the incident of the 15th July, 1965, when he received a letter from A.S.P. Fong Ying Loong dated the 8th November, 1965. When he received the letter, investigations were made, but he could not ascertain who the persons who gambled on the night in question were. After receiving the letter, he issued a warning that any member found gambling on the premises would be expelled. No permission was granted by the defendant for the use of the premises for gambling on the night in question.

On the evidence before me, I was not satisfied that the defendant had been guilty of using or permitting the use of the premises as a common gaming house in contravention of section 4(1)(a) or (b) of the Common Gaming Houses Ordinance, 1961. I therefore dismissed the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Lal Behari Singh; Cheng & Co.*

BUKIT RAJAH RUBBER CO. LTD. v. COLLECTOR OF LAND REVENUE, KLANG

[O.C.J. (Raja Azlan Shah J.) October 12, 1967]
[K.L. — Civil Application No. 2 of 1966]

Land Laws — Compulsory acquisition — Rubber estate land acquired for radio station — Market value — Methods of assessment — Agricultural value — Potential development value — Land Acquisition Act, 1960.

This was a reference under section 38 of the Land Acquisition Act, 1960, in respect of the compulsory acquisition by the Central Government of 50 acres of land under rubber, about 25 years old, belonging to the applicant for a site for Radio Malaysia transmitting station. The land is situated about 3 miles north of Klang town